



BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the amended complaint by Solange Lavendar dated February 1, 1996, alleging discrimination in employment on the basis of sex.

B E T W E E N :

Ontario Human Rights Commission

- and -

Solange Lavendar

Complainant

- and -

944369 Ontario Limited and John Polizogopoulos

Respondents

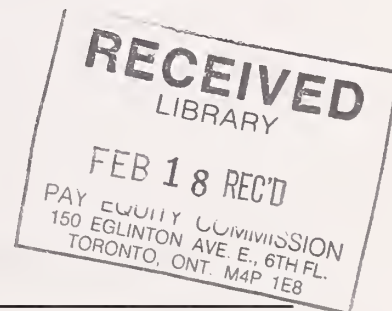
INTERIM DECISION

Adjudicator : Mary Anne McKellar

Date : February 13, 1998

Board File No: BI-0129-97

Decision No : 98-003-I



Board of Inquiry (*Human Rights Code*)

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The Complainant alleges that the Respondents discriminated against her in her employment on the basis of pregnancy, contrary to the *Code*.

The Respondents employed the Complainant as a waitress for a period of approximately eight weeks.

The Complainant alleges that the Respondents terminated her employment. The Respondents claim that she quit and that they refused to rehire her. Regardless of how the cessation of the Complainant's employment is characterized, the Respondents' position is that her pregnancy had nothing to do with their actions: the Respondents treated the Complainant as they did simply because she was a bad employee. Various specific defects with her performance were identified by the Respondents.

The Complainant has been cross-examined by the Respondents Counsel on the issue of her work performance and attitude. So too have two other witnesses called on the Complainant's behalf who actually worked with her. The Personal Respondent and the manager of one of his restaurants have

also testified with respect to the Complainant's performance while working for the Respondent. The Respondents have also indicated their intention to call at least three other witnesses who actually worked with the Complainant.

In addition to the witnesses described above, the Respondents also wish to call as witnesses two of the Complainant's subsequent employers. The Commission has objected, taking the position that evidence with respect to the Complainant's work performance for subsequent employers, in particular whether she was "bossy" and refused to take direction, relates to a collateral issue in these proceedings and ought not to be admitted as it does not satisfy the criteria for the admissibility of similar fact evidence.

Respondents' Counsel in his opening statement said that this was not an employment law case. I agree with him. The object of my inquiry is not to determine whether the Complainant was an effective employee or whether the Respondents managed the employee relations aspect of their business in an appropriate manner. Simply put, the Respondents could have engaged in the worst possible employment practices, but still not have contravened the *Code*. And the Complainant may have been the world's worst waitress, but if the Respondent treated her differently from other employees because of her pregnancy, that would still amount to a contravention of the *Code*.

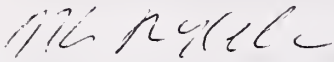
Having said that this is not an employment law case, however, the Respondents have legitimately raised the issue of the Complainant's work performance in order to explain why they treated her as they did. They hope that I will believe their denial that considerations of her pregnancy had anything to do with their actions if I can conclude that she was a poor employee.

Whether or not the Complainant's performance was objectively speaking "poor" enough to justify the Respondents' actions is not something I need to determine. Rather, I need to determine whether it was poor enough in comparison to the Respondents' own standards to justify their actions. Was the Complainant treated the way the Respondent treated other employees they considered to be performing poorly?

It is difficult to see what relevance the subsequent employers' evidence about the Complainant's work performance could have to the Respondents' perception and assessment of her work performance as compared to their own standards at an earlier time. Even to the extent that the Complainant's performance objectively assessed were in issue, there is better direct evidence available from persons who were employed with her in the workplace at the relevant time. Any evidence sought to be adduced from the subsequent employers with respect to the Complainant's performance while working for them is therefore irrelevant to and inadmissible in the proceedings before me.

Should there be other areas in which the proposed witnesses are able to provide relevant testimony, their testimony may (subject of course to any objections that may be made and sustained) proffered for that purpose.

Dated at Toronto this 13th day of February 1998:



Mary Anne McKellar
Member, Board of Inquiry